United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

with affidavit

75-6054
75-6055

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To be argued by
DANIEL J. PYKETT

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 75-6054, 75-6055

P/S

LUIS A. LEBRON, JR.,
Plaintiff-Appellant,

—v.—

THE UNITED STATES SECRETARY OF THE AIR FORCE,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States Secretary of the Air Force.

DANIEL J. PYKETT,
NAOMI REICE BUCHWALD,
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BRIEF OF DEFENDANT-APPELLEE

Preliminary Statement

Plaintiff-appellant Luis Lebron, Jr., appeals from an order of the United States District Court for the Southern District of New York, filed and dated April 14, 1975, in which Judge Milton Pollack dismissed plaintiff's two complaints attacking his military court-martial convictions and granted defendant-appellee's cross-motions for judgment on the pleadings.

Plaintiff, having exhausted his military remedies, attacked both convictions in United States District Court, asserting jurisdiction under the habeas corpus provisions of Title 28, United States Code and under Section 1346 of the same title.

Issues Presented

1. Does the court have jurisdiction to hear a petition for habeas corpus when the petitioner is not in custody?

2. Is Article 134 of the Uniform Code of Military Justice constitutional as applied to a conviction for the possession and use of heroin?

3. Have the military courts given full and fair consideration to plaintiff's attack on the search warrant?

4. Does due process require the trial judge to rule on every motion for a new trial?

5. Does due process require an evidentiary hearing on every motion for a new trial based upon a "confession" of a third-party?

6. Is a conviction by a vote of two-thirds of the jury in a military court-martial constitutional?

Statement of Facts

The Narcotics Court—Martial

On August 27, 1970 the Vice Commander of Keesler Air Force Base issued a warrant to search the person of plaintiff and the premises occupied by him. (59a*) Probable cause for issuance of the warrant was based upon oral, unsworn statements of an Air Force Special Agent. The evidence seized was subsequently entered in evidence at the court-martial.

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* Page references followed by "a" refer to appellant's appendix.

Plaintiff-appellant was convicted by a general court-martial on January 12, 1971 for a violation of Article 134 of the Uniform Code of Military justice * for use and possession of heroin (37a). He was sentenced to six months confinement, forfeiture of pay and reduction of rank. Plaintiff served his sentence for that conviction between January 12, 1971 and June 17, 1971, having received time off for good behavior.

The Assault Court–Martial

In November 1971 an airman was severely beaten when he awoke in his barracks to discover he was being burglarized. Appellant was arrested and in December, 1971 convicted of the assault following a general court-martial in which two-thirds of the members of the jury agreed.** He was sentenced to three years confinement, forfeiture of pay and a bad conduct discharge.

Following appellant's conviction but prior to its affirmance by the convening authority, plaintiff's attorney advised the base commander that another airman had confessed to the assault for which plaintiff had been found guilty. The base commander directed the Office of Special Investigation to investigate the information presented by plaintiff's counsel. After completion of the investigation, the Staff Judge Advocate, having reviewed its findings, issued a supplemental review of the conviction (41a-49a). Thereafter the court-martial conviction was approved by

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* 10 U.S.C. § 934. The article prohibits, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces."

** Article 52 of the Uniform Code of Military Justice (10 U.S.C. 852(2)) provides for a two-thirds concurrence of the members of the jury for a conviction on such a charge.

the convening authority and plaintiff applied to the Judge Advocate General for a new trial. The application was referred by the Judge Advocate General to the Court of Military Review before which plaintiff's appeal was pending. * The Court of Military Review denied plaintiff's motion for a new trial. The decision of the Court of Military Review is appended to this brief. The Court of Military Appeals subsequently denied appellant's petition for review and appellant instituted the actions in United States District Court from which he takes this appeal.

At the time the complaints were filed, plaintiff had completely served his sentence for the narcotics conviction and had been released from confinement, but was on probation for the assault conviction.

Plaintiff's challenges to the two convictions are separate and distinct and will be treated accordingly.

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* Article 73 of the U.C.M.J. (10 U.S.C. § 873) provides that after approval by the convening authority of a court-martial sentence the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence. If the accused's case is pending before the Court of Military Review or before the Court of Military Appeals, the Judge Advocate General must refer the application to the appellate court for its determination.

ARGUMENT

I. The Narcotics Conviction

A. The Court Lacks Jurisdiction Since Plaintiff Was Not "In Custody" At The Time This Action Was Begun

The general rule, which Judge Pollack recognized, is that jurisdiction lies on a petition for habeas corpus only when the applicant is "in custody". 28 U.S.C. § 2241(c). This principle was recently reiterated by the Supreme Court:

> "The federal habeas corpus statute requires that the applicant must be "in custody" when the application for habeas corpus is filed. This is required not only by the repeated references in the statute, but also by the history of the great writ. . . ." *Carafas* v. *LaVallee*, 391 U.S. 234, 238 (1968).

Note 12 following that paragraph reads:

> "If there has been, or will be, an unconditional release from custody before inquiry can be made into the legality of detention, it has been held that there is no habeas corpus jurisdiction. See *Parker* v. *Ellis*, [362 U.S. 574 (1960)] at 582, n. 8 (Warren, C.J. dissenting); *Ex parte Baez*, 177 U.S. 378 (1900); *United States el rel. Rivera* v. *Reeves*, 246 F. Supp. 599 (D.C.S.D.N.Y. 1965); *Burnett* v. *Gladden*, 228 F. Supp. 527 (D.C.D. Ore. 1964)."

Here, there can be no doubt that plaintiff is not "in custody" as that term is used in Title 28, United States Code, Section 2241 and as it has been interpreted by the courts. Plaintiff was released from custody in June 1971 on his first conviction.

The custody due to his second conviction does not give him status to attack his first conviction.* Habeas corpus jurisdiction does not lie where the petitioner presently in custody is seeking to attack a conviction for which sentence has already been fully served and where, as here, there is no relationship between the conviction under attack and the conviction for which petitioner is presently in custody. *Brown* v. *Wainwright*, 447 F.2d 980 (5th Cir. 1971); *Diehl* v. *Wainwright*, 423 F.2d 1108 (5th Cir. 1970); *United States ex rel. Collins* v. *Cady*, 322 F. Supp. 1168 (E.D. Wis. 1971).

Judge Pollack correctly points out that "under certain circumstances where merits have been established, jurisdiction of the Courts to review a court-martial decision has been found proper, even though habeas corpus jurisdiction would not lie because the plaintiff was not in custody" (3a). It is submitted that in this case, where as will be demonstrated below, the issues raised by appellant are without merit and/or have been fully and properly considered by the military court, no effort should be made to search the writs and create jurisdiction where it otherwise does not exist. Cf. *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975).

B. Assuming Jurisdiction, Article 134 of the Uniform Code of Military Justice Is Constitutional

Plaintiff attacks his conviction for heroin use and possession under Article 134 which prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces, and all conduct of a nature to bring discredit upon the armed forces."

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* Plaintiff was on probation for his second conviction at the time he filed the complaint attacking the first conviction.

The recent decision in *Parker* v. *Levy*, 417 U.S. 733 (1974) puts to rest any doubt as to the constitutionality of Article 134. In *Parker* Article 134 was attacked under the "void for vagueness" doctrine. The Supreme Court stated:

> This court has on more than one occasion invalidated statutes under the Due Process clause of the Fifth or Fourteenth Amendments because they contained no standard whatever by which criminality could be ascertained . . .
>
> But the Court of Appeals found in this case, and we agree, that Article 133 and 134 are subject to no such sweeping condemnation. Levy had fair notice from the language of each Article that the particular conduct which he engaged in was punishable." * (417 U.S. at 755).

Reasoning from the *Parker* decision, the rejection of plaintiffs' argument follows *a fortiori*. Plaintiff could have had no reasonable doubt that his use and possession of heroin was "to the prejudice of good order and discipline in the armed forces," in violation of Article 134. One need only imagine a military unit addicted to heroin to see the folly of plaintiff's interpretation of *Parker*. Indeed, Judge Blackmun cited drug offenses as an example of acts which soldiers know or should know are violations of Article 134. *Id.* at 763.

Plaintiff, in essence, argues that the *Parker* decision, should be interpreted by this Court to mean that military personnel can be prosecuted under Articles 133 and 134 only if the crime committed is one which is not enumer-

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* See *also*, *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974).

ated in the civil laws. He suggests that if the crime is recognized in civil law and is not duplicated by some other section of the Uniform Code of Military Justice then it is not punishable by Articles 133 and 134. Such an interpretation is "grasping for straws" and should be rejected.

C. Even Assuming Jurisdiction Attaches, The Search Warrant Issue Has Received Full And Fair Consideration By Military Courts And Should Not Be Reconsidered By This Court

Assuming arguendo that jurisdiction attaches, we address appellant's argument that the warrant which authorized the search of his premises for narcotics and which resulted in a seizure and evidence introduced at trial was improperly obtained because it was issued on the basis of oral and unsworn statements of a narcotics agent.

Article III courts have traditionally limited their collateral attacks on courts-martial in recognition of "the basic principles of comity which must prevail between civilian courts and the military judicial system," *Parisi* v. *Davidson*, 405 U.S. 34, 36 (1972), to a determination of whether the military "has dealt fully and fairly" with the issue raised. If full and fair consideration has been given by the military court then its determination is final. *Id.; Hiatt* v. *Brown*, 339 U.S. 103, 110-111 (1950).

Judge Pollack correctly rejected appellant's argument, which received due consideration in the military courts. The procedure followed to obtain the warrant has been specifically approved in military tribunals (5a, n. 4) and is not otherwise constitutionally deficient.

II. The Assault Conviction

A. The Procedures of Article 73 for determining new trial petitions do not violate due process.

Plaintiff offers two due process challenges to the Air Force's resolution of his application for a new trial: the first predicated on the fact that the application was not referred to the trial judge and second predicated on its resolution without an adversary hearing. Plaintiff made an application for a new trial after obtaining a purported confession from Bendell Gill (39a-40a).

There is absolutely no constitutional requirement that a motion for a new trial be heard by the original trial judge. *United States* v. *Meldrum*, 146 F. 390, 395-96 (D.C. Ore. 1906), *aff'd*, 151 F. 177 (9th Cir. 1907). An unbending rule that all motions for a new trial must be referred to the original trial judge might well serve goals of judicial economy at the expense of complete impartiality.* An inflexible rule would obviously lead to absurd results if the original trial judge pre-deceased the application. *United States* v. *Meldrum*, *supra*. Moreover, in the military context, the present procedure of Article 73, 10 U.S.C. §873, providing for resolution of the application by the Judge Advocate General, the Court of Military Review, or Court of Military Appeals, is much more likely to lead to legally well-reasoned and sensible result in all cases. This is because the presiding officer of special

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* It was observed in *Moore's Federal Practice*, ¶ 33.03[1]: "There is surely great economy in having the person who knows most about the case determine the validity and probable effect of alleged new evidence. But there is also the danger that the judge might become an advocate for the result." *Compare, United States* v. *Bryan*, 393 F.2d 90 (2d Cir. 1968) in which this Court noted that the avoidance of partiality outweights the benefits of judicial economy when holding that a different judge should generally preside over the retrial of a case.

or summary courts-martial need not even be a lawyer. 10 U.S.C. § 816.*

Although there is limited case authority on whether the trial judge must determine an application for a new trial, it is well-settled that a habeas corpus petition need not be determined by the original judge. *Townsend* v. *Sain*, 372 U.S. 293, 317 (1962) (petition based on newly discovered evidence); 28 U.S.C. § 2241 and § 2254. We submit that there is no valid reason that the rule should be otherwise for new trial motions.

Plaintiff's second challenge to the rejection of his new trial application was that it was done without an adversary hearing and in part on the basis of an ex parte investigation done by the Office of Special Investigation at the request of the convening authority. In passing upon this contention, both the district court and this court may be viewed as appellate courts reviewing the denial by the convicting court of a motion for a new trial. Such a denial should not be reversed unless the determination is wholly unsupported by the evidence. *United States* v. *Johnson*, 327 U.S. 106, 111-112 (1946).

It is well-settled that an evidentiary hearing is not necessary whenever a motion for a new trial is made. *United States* v. *Troche*, 213 F.2d 401, 403 (2d Cir. 1954) and cases cited therein. Indeed, it was observed in *Moore's Federal Practice*, ¶ 33.03[3], that hearings on motions for a new trial are "disfavored" by the courts when based, as here, on newly discovered evidence. Logic dictates such a result: many motions for a new trial will

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* Moreover, it can be argued that the military procedure received *sub silentio* approval in *Gusik* v. *Schilder*, 340 U.S. 128 (1950) in which the Supreme Court remanded a habeas corpus petition for failure to exhaust military remedies.

obviously be without merit, e.g. based upon evidence which due diligence would have discovered during trial. Accordingly, Judge Pollack properly ruled that the failure to hold a hearing did not violate due process.

However, Judge Pollack suggested that it might have been an abuse of discretion for a district court judge deciding a motion for a new trial under Rule 33, Fed. R. Crim. P. to have failed to hold a hearing. We respectfully disagree. The lack of credibility of Gill's "confession" is readily apparent if it is compared to the testimony at trial. As the Court of Military Review observed (Addendum, 7a-8a); (1) Gill stated that the victim's wallet was in his pant's pocket (22a) while the victim had stated that the wallet was in his desk drawer; (2) Gill stated that the victim awoke as he went to open his locker (22a), which is contradicted by the evidence that the locker was found in disarray (47a); and (3) Gill stated that he hit the victim with a tire jack handle (22a), while the victim testified that he had been struck with a lamp (48a). Thus, a district judge could readily have found Gill's confession incredible without holding a hearing and such a finding would not have been disturbed on appeal as an abuse of discretion. *United States* v. *Johnson, supra.**

As noted earlier, plaintiff also complains because an *ex parte* investigation ordered by the convening authority

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* Judge Pollack relied on two cases to support his conclusion, that a failure to hold a hearing might have been an abuse of discretion. *Casias* v. *United States*, 337 F.2d 354 (10th Cir. 1964) and *DeBinder* v. *United States*, 303 F.2d 203 (D.C. Cir. 1962). Neither case is dispositive of the issue. In *Casias*, the trial court had denied the motion for a new trial on the ground that it was untimely. The appellate court found the motion timely and hold that an evidentiary hearing be held. *DeBinder* is only for the proposition that a "credible confession" is deserving of a hearing. Here the confession is inherently incredible.

was in part relied on by the Court of Military Review. That such an investigative procedure is not part of the civilian judicial system does not necessarily mean that it violates due process. The Office of Investigations is to conduct an impartial investigation. Surely, the investigation here was thorough (41a-49a). Indeed, plaintiff has not even begun to suggest what cross-examination he would conduct or witnesses he would call if a hearing were held. In any event, it is clear that plaintiff was not prejudiced by the fact that an investigation was held: the so-called confession could have been rejected without it.

B. The Provision Of The Uniform Code Of Military Justice Authorizing A Conviction By A Two-Thirds Vote Of The Jury Is Constitutional

Plaintiff attacks his conviction for assault because it was rendered by a two-thirds vote of the court-martial in accordance with Article 52(3) of the Uniform Code of Military Justice, 10 U.S.C. § 852. Plaintiff contends that such a conviction violates his right to a unanimous jury verdict under the Sixth Amendment. Such an argument presupposes the wholesale application of the Sixth Amendment to military courts-martial. That proposition was rejected in *Whelchel* v. *McDonald*, 340 U.S. 122 (1950) where the Supreme Court stated:

> "Petitioner can gain no support from the analogy of trial by jury in the civil courts. The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by court-martial or military commissions. See *Kahn* v. *Anderson*, 255 U.S. 1, 8; *Ex parte Quirin*, 317 U.S. 1, 40-41." (354 U.S. at 126-127)

Many courts have since held that a unanimous verdict is not required in military courts-martial where the Sixth

Amendment does not apply, e.g., *U.S. ex rel O'Callahan* v. *Parker*, 256 F. Supp. 679, 682 *reversed on other grounds* 395 U.S. 258 (1969); *Schilder* v. *Gusik*, 195 F.2d 657 (6th Cir. 1952), *cert. denied*, 344 U.S. 844 (1952).

In addition, plaintiff suggests that Mr. Justice Powell who voted to affirm the constitutionality of non-unanimous jury verdicts in state court criminal proceedings in *Johnson* v. *Louisiana*, 406 U.S. 356 (1972) would decide the issue differently were he considering a military court-martial case and would thus provide the fifth vote which would hold non-unanimous federal jury convictions unconstitutional. Judge Pollack has correctly analyzed this argument in pointing out that Judge Powell predicated his view upon the theory that the Sixth Amendment in its entirety did not apply to the states and that since the Sixth Amendment right to a jury trial does not apply to the military courts, *Whelchel* v. *McDonald*, 340 U.S. 122 (1950), Justice Powell would reach the same conclusion he reached in *Johnson* v. *Louisiana*, *supra*.* (18a) Furthermore, appellant ignores the fact that Mr. Justice Douglas, who dissented in *Johnson* v. *Louisiana*, wrote the opinion for the court in *Whelchel* v. *McDonald*. To use appellant's approach, were the Supreme Court to reconsider the applicability of the Sixth Amendment to military courts we can assume that Mr. Justice Douglas would join the majority and affirm his earlier holding in *Whelchel* that the Sixth Amendment does not apply to military courts-martial and that unanimous verdicts are not required.

CONCLUSION

The decision of the District Court should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States Secretary of the Air Force.

DANIEL J. PYKETT,
NAOMI REICE BUCHWALD,
Assistant United States Attorneys,
Of Counsel.

ADDENDUM

UNITED STATES

—v.—

Airman Basic LUIS A. LEBRON, JR., FR 095-42-8929, Headquarters 3380th Air Base Group (formerly of Headquarters, 3320 Retraining Group)

ACM 21047

4 January 197a

Sentence adjudged 17 December 1971 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: William W. Gobrecht. Approved sentence: Bad conduct discharge, total forfeitures, and confinement at hard labor for three (3) years.

Appearances: Appellate Counsel for the Accused: H. Elliot Wales, New York, New York. Colonel George M. Wilson and Lieutenant Colonel James LaBar. Appellate Counsel for the United States: Colonel Henry R. Lockington, Colonel C. F. Bennett and Major Stark O. Sanders, Jr.

DECISION

HALICKI, Judge:

The accused was tried by general court-martial for aggravated assault in which grievous bodily harm was intentionally inflicted. Despite his pleas to the contrary, he was convicted as charged and sentenced to bad conduct

discharge, total forfeitures, and confinement at hard labor for three years.

The accused, in his request for appellate representation, has asserted 15 errors. In addition, appellate defense counsel counsel have assigned five errors, some of which include those set out by the accused. There has also been filed a Petition for New Trial, which The Judge Advocate General, USAF, has referred to us pursuant to Article 73, Uniform Code of Military Justice. Except for the matters we shall consider below, we find the asserted errors were adequately discussed in the staff judge advocate's review and correctly resolved against the accused, or are without merit.

The second error assigned by appellate defense counsel states:

> "II. THE CONVENING AUTHORITY IMPROPERLY REJECTED THE NEWLY DISCOVERED EVIDENCE AND THE REQUEST FOR A NEW TRIAL, AND ERRONEOUSLY APPROVED THE CONVICTION, BY ACTING ON AN EX PARTE REPORT, WHICH WAS NOT PART OF THE TRIAL RECORD, WAS NOT SHOWN TO THE DEFENSE, AND WAS NOT TESTED BY CROSS-EXAMINATION."

Following trial, but before action on the record was taken, an attorney retained by the accused's family submitted to the convening authority an affidavit by a former airman named Gill. In the affidavit, Gill admitted to doing certain acts which would, if true, make him guilty of the crime charged against the accused and completely exonerate the accused. The attorney referred the convening authority to paragraph 85b of the Manual for Courts-

Martial, 1969 (Revised edition), which deals with the staff judge advocate's evaluation of the findings in his review, and "to the spirit of Article 73, UCMJ", which deals with petitions for new trial. In addition, he asked that the accused not be reassigned "until this matter has been thoroughly explored and a decision made."

Although the staff judge advocate proceeded to prepare a review, the convening authority deferred taking action on the record, and caused the Office of Special Investigations to investigate the matters presented him by the accused's counsel. Upon completion of the investigation, the staff judge advocate in a supplemental review, carefully examined the results of the investigation, and analyzed the affidavit, together with certain verbal statements made by Gill to the investigators. Also considered in the evaluation of Gill's affidavit and oral statements, were laboratory tests conducted in the course of the post-trial investigation. As a result, the staff judge advocate concluded the discrepancies in Gill's statements, when compared with laboratory tests, and the evidence presented at trial, justified the conclusion that Gill was not confessing to the crime of which the accused had been convicted, and recommended to the convening authority that he act on the record. Though not spelled out, it is obvious that he urged approval of the findings and sentence, as he had done at the time of the original review. This was done.

Initially, we note that the attorney tendering Gill's affidavit recognized that he was not submitting a petition for new trial. While the Code gives to an accused the right to petition for a new trial after the case is acted upon by the convening authority, it is silent as to the method by which he can obtain relief before the first review. Article 73, Code, supra; United States v. Webb, 8 USCMA 70, 23 CMR 294 (1957). It would appear,

however, that the attorney's reference to paragraph 85b of the Manual correctly indicated one possible course of action, for the staff judge advocate's

> ". . . review may include matters outside the record of trial which, in the opinion of the reviewer, may have a legitimate bearing on the action of the convening authority in the exercise of his discretion to disapprove all or a part of the findings [of guilty]. . . ." Manual for Courts-Martial, supra, paragraph 85b.

Thus, a convening authority is empowered to disapprove findings of guilty, or any part of them, by considering matters outside of the record.

This, however, is not the only action open to him, for he could order a rehearing pursuant to Article 63 of the Code; contrariwise, if unpersuaded by the matters presented to him aliunde the record, but convinced of an accused's guilt beyond a reasonable doubt by the evidence of record, he is free to approve the findings. See United States v. Chadd, 13 USCMA 438, 32 CMR 438 (1963).

An examination of the staff judge advocate's review, and the supplemental review thereto, makes it clear that the convening authority was correctly advised that the only evidence he could consider in approving the findings was the evidence of record presented prior to the findings. The results of the post-trial investigation, on the other hand, were used only to evaluate the credibility of Gill, in order that the convening authority could make an intelligent choice of the courses of action open to him. Accordingly, we find no error in his approval of the findings of guilty, for he acted only on the evidence of record. The post-trial investigation, moreover, was not conducted pursuant to any law or regulation entitling the

defense access to it, hence the defense complaint as to its ex parte nature, contained in the assignment set out about and in a Supplemental Petition for New Trial, is without merit.

We turn now to the Petition for New Trial,[1] and note that:

> "A petition for a new trial is an extraordinary remedy which Congress has provided in addition to normal appellate channels. Generally speaking, it is designed to reach extra-record matters which affect an accused's guilt and thereby prevent injustice." United States v. Chadd, supra.

Under both the Manual and our Rules of Practice and Procedure, this Court is empowered to cause such investigation to be made as is considered necessary to pass on the merits of a petition for new trial. Manual for Courts-Martial, 1969 (Revised edition), paragraph 109f; AFM 111-4, Courts of Military Review Rules of Practice and Procedure, Rule 20b. Since an investigation into the identical matter before us has already been made, we have elected not to initiate another. Rather, we have on our own initiative examined that investigation, and attach to the record only those portions which are relevant and which appear to have been considered by the convening authority's staff judge advocate in his Addendum to the review.

A new trial under Article 73 may be granted only upon the grounds of newly discovered evidence or fraud on the court. Sufficient grounds for granting a new

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[1] Although the Petition for New Trial has not been signed under oath or affirmation, as required by paragraph 109e, Manual for Courts-Martial, 1969 (Revised edition), we have, in the interest of avoiding further further delay in the disposition of this case, proceeded as if it had been so signed.

trial will be deemed to exist only if, within the discretion of the authority considering the petition, all the facts and information before that authority, including, but not limited to, the record of trial, the petition, and other matters presented by the accused, affirmatively establish that an injustice has resulted from the findings or the sentence and that a new trial would probably produce a substantially more favorable result to the accused. Manual for Courts-Martial, supra, paragraph 109d. There is no suggestion in this case that a new trial is sought on the grounds of fraud on the court; on the contrary, it is evident that the petition looks upon Gill's affidavit as newly discovered evidence, and it is on that basis that the accused seeks his remedy. A new trial will not be granted, however, unless the evidence meets three requirements. These are:

(1) The evidence is in fact newly discovered, that is, discovered since the trial;

(2) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence;

(3) The newly discovered evidence, if considered by a court-martial in the light of all pertinent evidence, would probably produce a substantially more favorable result for the accused. Ibid.

The evidence presented in the petition may indeed have been newly discovered. Additionally, we will assume that due diligence was exercised. Our decision, however, must turn on whether this evidence, in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused. United States v. Farrington, 14 USCMA 614, 34 CMR 394 (1964); United Sttes v. Chadd, supra.

Our examination of the evidence presented at the trial, Gill's affidavit and oral statement, and the results of the pretrial and post-trial investigations, convinces us that Gill's statements, confessing the offense charged against the accussed are untrue.

We will set out below a number of examples where statements of crucial importance, made by Gill, are inconsistent with other statements made by him, or contradicted or rendered doubtful by the evidence of record, or by the extra-record matters we have considered. Before doing so, we must first state that the victim involved identified the accused as his assailant, in a fair, well conducted line-up on 13 August 1971.[2] He again identified the accused as his assailant at trial. He was positive in his identification and his testimony on this point was unshaken.

Gill's Statement	*Evidence Contra*
He found victim's wallet in victim's trousers.	Victim had placed his wallet in desk drawer.
He opened locker on the left as one enters victim's room.	The record shows it was the locker on the right as one enters the room.
As he opened the locker victim awoke, he struck him, then fled (affidavit).	He examined locker contents for two minutes before victim awoke (verbal statement); evidence shows locker was in disarray.

[2] The victim suffered grave and extensive injury to the skull and brain on 17 November 1970, the night he was assaulted. He was aphasic, unable to communicate through speech or writing until some time after Christmas 1970, at which point he was dysphasic, able to talk only in words and phrases. It was in the following months that he was sufficiently able to communicate information which made the accused a suspect.

Gill's Statement	*Evidence Contra*
The weapon he used to strike the victim was a tire jack iron or a lug wrench-type jack handle.	The victim testified his assailant used a bedside gooseneck lamp; pretrial and post-trial laboratory examinations by FBI disclosed hairs adhering to blood on lamp base were crushed or broken, and microscopically matched the victim's, as did the blood; FBI laboratory examination of jack handle or tire wrench found in Gill's automobile, owned by him on 17 November 1970, disclosed no blood or hairs like the victim's.[3]
He left his victim lying on the floor.	The victim was found in bed on his back. The neurosurgeon believed the blows would have made him unconscious.
He was dressed, and wore a jacket which received blood stains on the right sleeve.	Victim said assailant wore "skivvy" drawers and a T-shirt; FBI laboratory examination of the jacket Gill said he wore failed to disclose any trace of blood.[3]

[3] The laboratory examination was conducted approximately 16 months after the crime. Although the evidentiary weight to be afforded it is, perhaps, decreased, it nevertheless fails to support Gill's assertions.

Gill's Statement	*Evidence Contra*
When he returned to his automobile, he threw the jack handle into the 1969 Oldsmobile Cutlass.	Records disclosed he owned a 1965 Chevrolet Impala at the time of the offense, trading it for a 1969 Oldsmobile Cutlass on 28 November 1970; FBI laboratory examination of the Chevrolet's seat covers, floor mats and a jack handle found therein, failed to disclose any blood thereon, or hairs comparable to the victim's.[3]

We have set out above a number of the major discrepancies in Gill's statements. Should Gill appear as a witness [4] in any new trial granted the accused, it is obvious that his credibility could be attacked with devastating effect. In summary, the entire circumstances regarding this "newly discovered evidence", including the record of trial, and the pre-trial and post-trial investigations, fail to convince us that a new trial would probably produce a substantially more favorable result for the accused. The Petition for New Trial is, therefore, denied.

We next consider appellate defense counsel's fifth assertion of error, that:

> "V. THE STATUTE (10 USC 852(a)(2)) AUTHORIZING A CONVICTION BY A TWO-THIRD VOTE IS UNCONSTITUTIONAL."

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[4] During the course of the post-trial investigation, efforts to reestablish contact with Gill proved fruitless, and his whereabouts appear to be unknown.

The provision referred to is Article 52(a)(2), of the Code, which reads as follows:

> "No person may be convicted for any other [than a mandatory death penalty] offense, except . . . by the concurrence of two-thirds of the members present at the time the vote is taken."

In support of the assertion, appellate defense call our attention to Johnson v. Louisiana, 406 U.S. 356 [32 L. Ed. 2d 152, 92 S. Ct. 1620 (1972)], decided 22 May 1972, which, by a five-four vote, held that a less than unanimous verdict in a state criminal prosecution is not subject to constitutional attack. In a concurring opinion, however, Mr. Justice Powell stated that while he agreed with the majority that while he agreed with the majority decision as to state prosecutions, he agreed with the dissenters that unanimity is the constitutional rule for Federal prosecutions. Appellate defense argue that the Uniform Code of Military Justice is a product of congressional action and is a part of the Federal system. They would have us apply the unanimity rule to the verdict of courts-martial.

Whatever the Supreme Court's decision may ultimately be with regard to unanimous verdict in the Federal jury system, it would appear to affect only trials in courts whose jurisdiction is founded under Article III of the Constitution, and not to military courts which exist by virtue of Article I. As the Supreme Court said in Ex parte Milligan, 4 Wall 2 (1866):

> "The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases; but the fifth, recognizing the necesssity of an indictment, or presentment, before anyone can be held to answer for high crimes, 'excepts cases

> arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger'; and the framers of the Constitution, doubtless, meant to limit the right to trial by the jury, in the Sixth Amendment, to those persons who were subject to indictment or presentment in the Fifth."

The exception in the Fifth Amendment, of course, provides that grand jury indictment is not required in cases subject to military trial and this exception has been read over into the Sixth Amendment so that the requirements of jury trial are inapplicable. Reid v. Covert, 354 U.S. 1 (1957).

The Supreme Court has observed that:

> "Presentment by the grand jury and trial by a jury of the vicinage where the crime was committed weer at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to the military tribunals, which are not courts in the sense of the Judiciary Article, [Article III]. . . ." Ex parte Quirin, 317 U.S. 1 (1942).

The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than were furnished by the common law courts and in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service Ex parte Milligan, supra.

Accordingly, we find Article 52(a)(2) of the Code to be nothing more than a valid exercise of congressional powers under Article I, section 8, clause 14, of the Con-

stitution, which authorizes the Congress to make rules for the government and regulation of the land and naval forces. We therefore find the assigned error to be without merit.

[8, 9] One last item remains to be discussed. The staff judge advocate's review, in considering the propriety of clemency, sets out in some detail the accused's conduct following a previous conviction by general court-martial for the possession and use of heroin. Most of it is adverse to the accused, for it reflects the commission of other offenses, and an unfavorable attitude toward rehabilitation at a time when he was assigned to the 3320th Retraining Group. There is no indication that these adverse matters from outside the record were shown the accused and that he was afforded the opportunity to rebut or explain them, as is necessary. United States v. Griffin, 8 USCMA 206, 24 CMR 16, (1957); AFM 111-1, Military Justice Guide, paragraph 7-5(3)(h), 26 Car 1971 (then applicable; the same requirement is now set out in AFM 111-1, paragraph 7-5(h), 30 Aug 1972).

The staff judge advocate's original review contains a comment that the accused, in view of Gill's affidavit presented the convening authority by his attorney, asked that he not be required to participate "at this time" in the detailed clemency interview referred to in paragraph 7-5, AFM 111-1; this request was granted. We cannot construe the accused's unwillingness to give a clemency interview as a waiver of his right to rebut or explain adverse matters outside the record. We find the failure to afford the accused this right was error.

Recognizing this, we can reevaluate the sentence without regard to the matters improperly considered by the staff judge advocate and the convening authority, and correct the error. United States v. Griffin, supra. Our

reassessment finds the adjudged sentence nevertheless appropriate.

The findings of guilty and the sentence are

Affirmed.

AMERY, Chief Judge, LETARTE and FRIEDMAN, Senior Judges, and CHOVANEC, Judge, concur.

BREWER, Judge, not participating.

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Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

CA 75-6054

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 1st day of October 1975 she served 2 copies of the within govt's brief on appeal

by placing the same in a properly postpaid franked envelope addressed:

H. Elliot Wales, Esq.,
747 Third Ave.
New York, NY 10017

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
1st day of October 1975

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977